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No. 93-1022

IN THE
Supreme Court of the United States
OCTOBER TERM, 1993

WESLEY M. REXROAT, PETITIONER

v.

UNITED STATES, RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF MILITARY APPEALS

BRIEF OF UNITED STATES NAVY-MARINE CORPS APPELLATE DEFENSE DIVISION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF THE *AMICUS CURIAE*

The United States Navy-Marine Corps Appellate Defense Division represents Navy and Marine Corps personnel on appellate review of court-martial convictions[1] who have the same interest as petitioner, Wesley M. Rexroat. This Division represented Private First Class Jonathan Holloway who challenged the same issue as petitioner, but the lower court remanded his case for further consideration. *United States v. Holloway*, 38 M.J. 302 (C.M.A. 1993). Unless this Honorable Court grants the petition for *certiorari* in the *Rexroat* case, the Court of Military Appeals' ruling in *Rexroat* will govern the outcome of future cases. Because a service member has a right to petition the Supreme Court for *certiorari* only if the Court of Military Appeals exercises its discretionary jurisdiction to

[1] Pursuant to Rule 37 of the Rules of this Honorable Court, *amicus curiae* filed letters of consent from both parties in this matter.

review the case,[2] these service members may never have an opportunity to seek review of the issue presented in the *Rexroat* case. As such, this division has an interest as an amicus curiae in the outcome of this case.

ARGUMENT

The lower court misapplied *Gerstein v. Pugh*,[3] by failing to require a *judicial* determination of probable cause as a prerequisite to an extended pretrial detention following a warrantless arrest. *Gerstein*, 420 U.S. at 124-25. This is evidenced by the court's conclusion that a military commander can make the required "neutral and detached" review of an initial probable cause detainment. In fact, the lower court's decision is much broader as it applies in the Navy and Marine Corps. In *Holloway*, the court ruled that either the commanding officer's ordering an accused into confinement or his review of a subordinate's decision to detain an accused, satisfies *Gerstein* and *County of Riverside v. McLaughlin*[4] as long as it occurs within 48 hours. *Holloway*, 38 M.J. at 303.

That ruling conflicts with the *Gerstein* court's realization that:

> Once the suspect is in custody, however, the reasons that justify dispensing with the magistrate's neutral judgment evaporate. There no longer is any danger that the suspect will escape or commit further crimes while the police submit their evidence to a magistrate. *And, while the State's reasons for taking summary action subside, the suspect's need for a neutral determination of probable cause increases significantly.*

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[2] 10 U.S.C.A. § 867a (West Supp. 1992); 28 U.S.C.A. § 1259 (West Supp. 1991).

[3] 420 U.S. 103 (1975).

[4] 500 U.S. 44 (1991).

Gerstein, 420 U.S. at 114 (emphasis added). Essentially *Gerstein* sets forth the basic principle that "the Fourth Amendment requires a *judicial* determination of probable cause as a prerequisite to extended restraint of liberty following arrest." 420 U.S. at 114 (emphasis added). *Gerstein* ensures that the police or government entity have "clean hands"[5] by having a safeguard, a neutral and detached individual who makes a subsequent review of the initial warrantless arrest. The practical effect of the lower court's ruling is to equate a commanding officer's decision to detain an accused to a federal magistrate's power to issue a warrant. The *Gerstein* Court was concerned about withholding the fundamental right to liberty without due process of law. Thus, in *Gerstein*, the Court mandated that a *judicial* review be done within a "prompt" period[6] of time after the accused has been apprehended and placed into confinement. 420 U.S. at 114.

Fundamentally, *Gerstein* holds that the neutral and detached reviewer cannot be anyone who has a prosecutorial or law enforcement role. 420 U.S. at 112, 118, *in accord with, Johnson v. United States*, 333 U.S. 10, 13-14 (1948). In the military, however, a commanding officer is "predisposed in his pretrial confinement decision to a particular interest of law enforcement within his command." *United States v. Lynch*, 13 M.J. 394, 396 (C.M.A. 1982). Under the court's ruling below,

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[5] For years, this Court's concern over police misconduct in the execution of official law enforcement roles centered around Fourth Amendment search and seizure scenarios. *See Mapp v. Ohio*, 367 U.S. 643 (1961) and *Cf. United States v. Leon*, 468 U.S. 897 (1984). The basis of the exclusionary rule is anchored in this Court's concern with the essence of "clean hands" by the government. *See generally, Leon*, 468 U.S. at 898.

[6] *Riverside* clarified that "prompt" meant within 48-hours absent some exigent circumstances. 500 U.S. at ___, 111 S. Ct. at 1670.

the commanding officer, the same individual who orders the service member into confinement pursuant to his law enforcement office and in many cases determines whether or not to prosecute the individual, makes the requisite "neutral and detached" probable cause determination.[7] Such a conclusion is tantamount to the fox guarding the hen house. Furthermore, it belies and, in fact, eviscerates the very protection guaranteed under *Gerstein* and its progeny.

Gerstein represents a fundamental truth: when detaining some individuals, a certain percentage of those individuals are unjustly confined. These persons deserve to be released as quickly as possible. "[T]he practice of arbitrary imprisonments, has been, in all ages, the favorite and most formidable instruments of tyranny." *The Federalist Papers*, No. 84, at 511-12 (Alexander Hamilton) (New American Library 1961). Confining an individual for an undue length of time, however brief the time seems, challenges seminal constitutionally-protected liberties. An expeditious probable cause determination by a neutral and detached party provides an essential protection to that person from being arbitrarily imprisoned.

Certainly a commander, who is "admittedly predisposed in his pretrial confinement decision to a particular interest of law enforcement within his command,"[8] will likely believe that he has probable cause to detain an individual he suspects

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[7] In so ruling, the court reversed its earlier precedents which had disqualified a commanding officer as acting as the judicial officer in making a pretrial confinement determination. *Lynch*, 13 M.J. at 1962 (holding that a person performing magisterial duties must be neutral and detached from the law enforcement and prosecution system itself); *United States v. Malia*, 6 M.J. 65 (C.M.A. 1978) (recognizing the subordinate relationship the commanding officer has with regard to the initial review officer); *Courtney v. Williams*, 1 M.J. 267 (C.M.A. 1976) (ruling that a neutral party must review a commander's probable cause determination).

[8] *Lynch*, 13 M.J. at 396.

of a crime. Just like the police officers in *Gerstein*, a commanding officer, who has already ordered an arrest, presumably will believe that he has probable cause to detain that individual. A neutral and detached official is a check on the government's power to detain an accused. It is the wrongly incarcerated who are protected by *Gerstein*. The Court of Military Appeals' ruling, however, permits the *Gerstein* review, not by a "neutral and detached" individual, but by an individual who exercises a degree of concern and authority unmatched in any other forum. This disqualifies him from making the neutral and detached determination which *Gerstein* requires.

CONCLUSION

This Court should grant *certiorari* to determine whether a military commander can ever make a judicial determination required under *Gerstein*.

Respectfully submitted,

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